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ONG COMMODITIES PTE LTD v. KEK TEK HUAT SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
VAZEER ALAM MYDIN MEERA J
[ORIGINATING SUMMONS NO: 24NCVC-278-02-2015]
B 5 OCTOBER 2015

CIVIL PROCEDURE: *Discovery – Pre-action – Application for – Debt owed to plaintiff – Whether documents in relation to charge produced by defendants – Whether defendant conducted themselves fraudulently – Whether proper to shift* C *burden to defendants in action for discovery of documents – Whether documents requested by plaintiff in defendants' possession – Contemporaneous documents produced to show discharge of charge – Whether sufficient – Whether plaintiff had bona fide cause of action against defendants – Whether plaintiff negligent in not keeping proper record of documents – Whether defendants owed duty to plaintiff to* D *securely keep documents – Rules of Court 2012, O. 24 r. 7A*

CIVIL PROCEDURE: *Stay of proceedings – Application for – Interlocutory application to stay proceedings filed three days before decision of main suit – Inspection of documents exhibited in affidavit – Whether special circumstances arose to warrant stay of proceedings – Whether plausible reason given for delay in making* E *application – Whether highly prejudicial to defendants – Whether an abuse of process of court*

The first defendant maintained a trading account with the plaintiff to trade in commodities. In order to secure the payments, the first defendant created charges over two of its properties, one of which the plaintiff had proceeded F with foreclosure action and thereafter sold by way of public auction. The charge over the other property ('the property') was given in favour of the plaintiff sometime in 1976 and the plaintiff maintained its position that the property was still charged to the plaintiff. On or about 26 August 2010, the first defendant's present company secretary ('the second defendant') G informed the plaintiff *via* e-mail that the first defendant was deemed to have their shares pledged to the plaintiff and the first defendant was no longer indebted to them. As such, it was revealed that the second defendant enclosed copies of the Form 42B (Companies Act 1965) for the execution of the plaintiff. The plaintiff, however, did not execute the said document and H asserted that the first defendant was still indebted to the plaintiff. *Vide* this originating summons ('encl. 1'), the plaintiff made an application for pre-action discovery of documents from the defendants pursuant to O. 24 r. 7A of the Rules of Court 2012 and sought, *inter alia*, for (i) all documents related to the charge over the property; (ii) all documents related to the open charge I registered with the Companies Commission of Malaysia ('CCM') on 23 April 1976 in favour of the plaintiff; and (iii) all documents evidencing the first defendant's understanding that the first defendant was deemed to have their shares pledged to the plaintiff sold off and it was no longer in debt with the

plaintiff, as stated in the second defendant's e-mail. The plaintiff argued that the defendants had conducted themselves fraudulently in respect of the charge and sought to obtain sufficient documentary evidence from the defendants so that it was able to make a reasonable assessment of the situation and decide whether to institute an action against the first defendant and/or such other parties. The plaintiff also argued that the first defendant had a statutory obligation under s. 115 of the Companies Act 1965 to keep a copy of all charging instruments and maintain a register of charges at the registered office of the company. The defendants, however, maintained their stand that they did not have the documents requested by the plaintiff in their possession. Although the defendants were unable to trace the charge documents, the defendants produced some contemporaneous correspondences and documents in respect of the charge and the discharge of the charge. In addition to encl. 1, the plaintiff filed an application under encl. 13 to, *inter alia*, stay the proceedings in encl. 1, including its decision, pending the disposal of encl. 13 and for an injunction against the defendant to prohibit them from presenting certain documents exhibited in the second defendant's affidavit in reply to the CCM for the purpose of striking out or cancelling the CCM charge. Further, the plaintiff sought an order for the defendants to produce the original or a copy of the documents referred to and mentioned in the second defendant's affidavit in reply to be inspected by the plaintiff and/or its expert document examiner.

Held (dismissing encls. 1 and 13 with costs):

(1) The contemporaneous correspondence and documents in relation to the charge showed that the first defendant had created a charge in favour of the plaintiff and the said charge was fully satisfied. Thus, the plaintiff had issued a letter to the Pendaftar Syarikat Malaysia to the effect that the charge had been satisfied on 12 August 1977. Further, as required by the Companies Act 1965, the first defendant made a statutory declaration verifying the memorandum together with a necessary memorandum in Form 43 which stated that the property was released from the registered charge or had ceased to form part of the company's property or undertaking and presented the same for registration. The first defendant was then issued with a certificate of registration of satisfaction of charge dated 14 October 1977 since the CCM charge had been satisfied. (paras 17 & 18)

(2) The satisfaction of the CCM charge was corroborated by the contemporaneous exchange of correspondence between the plaintiff and the first defendant's then solicitors. These correspondences showed that there were negotiations between the plaintiff and the first defendant in respect of the settlement of the monies which was owed to the plaintiff. Further, the documents produced by the defendants were made some 39 years ago. As such, the presumption of due execution and attestation under s. 90 of the Evidence Act 1950 applied (*Ghazali Arifin v. Ahmad Bakar*; refd). (paras 19 & 21)

(3) The defendants had used their best endeavour to retrieve and produce documents which were in their custody, control or possession. The defendants, however, could not be faulted for the plaintiff's own recklessness or negligence in not keeping proper records of their own. Further, the defendants did not owe a duty to the plaintiff to securely keep these documents and produce them as and when the plaintiff required them. (para 22)

(4) There was a statutory obligation on the first defendant as a company to conform to the requirements of s. 115 of the Companies Act 1965. The first defendant did not securely keep a copy of the CCM charge or maintain a register of charge at its registered office. If there was a breach of s. 115, then it would be for the appropriate authority to take action against the first defendant. Such breach could not in any way entitle the plaintiff to an order to compel the production of the documents. Further, the defendants had stated under oath that they did not have these documents. Thus, the plaintiff failed to establish the requirement for the grant of a pre-action discovery order, *ie*, that the plaintiff required information and documents which were in the possession, custody or control of the defendants. In the circumstances, the making of such an order would be an exercise in futility and would not serve any useful purpose. (para 23)

(5) An order for discovery would be granted only when the plaintiff could demonstrate that it had some cause of action against the defendants. On the facts, the second defendant did not have any direct knowledge of the transaction between the plaintiff and the first defendant. The plaintiff believed that the discharge of charge referred to by the second defendant in the e-mail could only be in relation to the charge over the property and not to any pledge of shares. Further, the first defendant did not at any time pledge any shares to the plaintiff as security for repayment of its debts to the plaintiff. It was more probable than not that the charge had been satisfied and discharged. As such, the plaintiff failed to establish that it had a *bona fide* cause of action against the defendants. (paras 24 & 25)

(6) The plaintiff was not entitled to an order for discovery of documents based on the reasons that the defendants had committed some wrongful or fraudulent acts against the plaintiff. The plaintiff bore the burden to prove fraud, improper conduct or negligence against the defendants. However, an order of discovery would not be made where such an order would have the effect of shifting the burden of proving fraud or impropriety from the plaintiff to the defendants. The plaintiff was also seeking to incriminate the defendants. In the circumstances, an order for discovery could not be made. (paras 26 & 27)

(7) There were no special circumstances to warrant a stay of proceedings and it was an abuse of process to delay the delivery of the court's decision. The plaintiff could have filed any interlocutory applications in respect of the documents disclosed in the second defendant's affidavit well before the date fixed for the delivery of the decision of encl. 1. However, the plaintiff filed encl. 13 three days before the delivery of the decision of encl. 1. The plaintiff did not give any plausible reason for the delay in making this application. It would be highly prejudicial to the defendants to stay the proceedings. It was questionable as to how an order for inspection of the documents exhibited in the second defendant's affidavit could assist the court in coming to a decision on that application. Further, an injunction is a remedy that must flow from some established cause of action. As such, the plaintiff's application for permanent prohibitory and mandatory injunctions was misplaced and without any legal basis. (paras 31-35)

Case(s) referred to:

ABX Logistics (Malaysia) Sdn Bhd v. Overseas Bechtel (Malaysia) Sdn Bhd [2003] 7 CLJ 357 HC ***(refd)***

Ashworth Hospital Authority v. MGN Ltd [2002] 1 WLR 2033; [2002] 4 All ER 193 ***(refd)***

Berkeley Administration Inc v. McClelland [1990] FSR 381 ***(refd)***

British Steel Corporation v. Granada Television Ltd [1981] AC 1096 ***(refd)***

Chan Pooi Leng v. Jabatan Ketua Pengarah Tanah dan Galian Persekutuan Unit Pembahagian Pusaka Perak Timur, Pejabat Tanah/Daerah, 33000 Kuala Kangsar; Mohamad Iqbal Shah Abdullasah (Intervener) [2014] 1 LNS 64 HC ***(refd)***

First Malaysia Finance Bhd v. Dato' Mohd Fathi Ahmad [1993] 3 CLJ 329 SC ***(refd)***

Ghazali Arifin v. Ahmad Bakar [1992] 1 MLJ 282 HC ***(refd)***

Kenwood Electronics (Malaysia) Sdn Bhd v. People's Audio Sdn Bhd & Ors [2003] 5 CLJ 436 HC ***(refd)***

Lee Lim Huat v. Yusuf Khan Ghows Khan & Anor [1997] 3 CLJ 197 CA ***(refd)***

Mary Ng v. R [1958] AC 173 ***(refd)***

Nishimatsu Construction Co Ltd v. Kecom Sdn Bhd [2008] 6 CLJ 149 CA ***(refd)***

RHB Bank Bhd v. Ab Malik Abdullah & Ors [2010] 6 CLJ 981 HC ***(refd)***

Shaw v. Vauxhall Motors Ltd [1974] 1 WLR 1035; [1974] 2 All ER 1185 CA ***(refd)***

Siskina (Cargo Owners) v. Distos Compania Naviera SA [1979] AC 210 ***(refd)***

Stemlife Bhd v. Bristol-Myers Squibb (M) Sdn Bhd [2008] 6 CLJ 200 HC ***(refd)***

Triplex Safety Glass Co Ltd v. Lancegaye Safety Glass (1934) Ltd [1939] 2 KB 395 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 11(11), 115
Evidence Act 1950, s. 90
Rules of Court 2012, O. 24 rr. 7A(1), (5), 10, 11, 12, 13, 16

Other source(s) referred to:

Malaysian Civil Procedure 2015, Vol 1, Sweet & Maxwell, p 353

For the plaintiff - Choi Kian You; M/s Albar & Partners
For the defendants - MS Raman; M/s Thevin Chandran & Assocs

Reported by Kumitha Abd Majid

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JUDGMENT

Vazeer Alam Mydin Meera J:

The Application

B **[1]** The plaintiff *vide* this originating summons (encl. 1) is seeking an order for pre-action discovery of documents pursuant to O. 24 r. 7A of the Rules of Court 2012 ("ROC").

[2] The discovery sought is in respect of documents relating to a charge over land known as Lot 22, Section 48, Town and District of Kuala Lumpur held under CT 3114 ("the property") given in favour of the plaintiff C sometime in 1976 ("the charge") and in particular seeks discovery of:

(a) all documents pertaining to the title to the property;

(b) all documents pertaining to the charge;

D (c) all documents pertaining to the open charge registered with the Companies Commission of Malaysia on 23 April 1976 under the first defendant in favour of the plaintiff ("CCM charge"); and

(d) all documents evidencing the first defendant's understanding that the first defendant is deemed to have their shares pledged to the plaintiff sold E off and that the first defendant is no longer in debt with the plaintiff, as stated in the second defendant's email dated 26 August 2010.

[3] The grounds of the application are that:

(a) the plaintiff has reason to believe that the defendants had conducted themselves fraudulently or in an otherwise improper or negligent F manner in respect of the charge; and

(b) therefore the plaintiff seeks to obtain sufficient documentary evidence from the defendants to put the plaintiff in a position where it is able to make a reasonable assessment of the situation and decide whether to G institute an action against the first defendant and/or such other parties.

The Law

[4] Before I proceed to consider the merits of the application, let me set out the law as it relates to applications of this nature. Prior to the coming into force of O. 24 r. 7A of the ROC, the jurisdiction of the court to grant H pre-action discovery was somewhat limited. This was reiterated by Gopal Sri Ram JCA in *Nishimatsu Construction Co Ltd v. Kecom Sdn Bhd* [2008] 6 CLJ 149 CA to the effect that:

> I Save in the circumstances set out in the decision of the House of Lords in *Norwich Pharmacal Co v. Customs and Excise Commissioners* [1974] AC 133, the court has no jurisdiction to grant anticipatory discovery that is to say discovery in anticipation of the action being filed.

Of course the *Norwich Pharmacal*'s case was the landmark decision of the English House of Lords that established the right of a person to seek an order for pre-action discovery against potential parties to an anticipated action or against third parties who may be in possession of information or documents that may assist the applicant to identify the wrongdoer and file an action. Now, that right to seek pre-action discovery is procedurally codified in O. 24 of the ROC.

[5] It must be gainsaid that to some extent O. 24 r. 7A of the ROC overlaps with the principles enunciated in the *Norwich Pharmacal*'s case, which principles was adopted and applied by our Supreme Court in *First Malaysia Finance Bhd v. Dato' Mohd Fathi Ahmad* [1993] 3 CLJ 329; [1993] 2 MLJ 497 and subsequently in several other cases. (See also the cases of *Lee Lim Huat v. Yusuf Khan Ghows Khan & Anor* [1997] 3 CLJ 197 CA; *Stemlife Bhd v. Bristol-Myers Squibb (M) Sdn Bhd* [2008] 6 CLJ 200; and *RHB Bank Bhd v. Ab Malik Abdullah & Ors* [2010] 6 CLJ 981.)

[6] The remedy of pre-action discovery is primarily intended to enable justice to be done - see O. 24 r. 7A(5). The House of Lords in *Ashworth Hospital Authority v. MGN Ltd* [2002] 1 WLR 2033; [2002] 4 All ER 193, quoted with approval the words of Templeman LJ in *British Steel Corporation v. Granada Television Ltd* [1981] AC 1096 at p. 1132 to the following effect:

> In my judgment, the principle of the *Norwich Pharmacal* case applies whether or not the victim intends to pursue action in the courts against the wrongdoer, **provided that the existence of a cause of action is established and the victim cannot otherwise obtain justice.** The remedy of discovery is intended in the final analysis to **enable justice to be done.** (Emphasis added)

[7] The grant or refusal of an order for pre-action discovery under O. 24 r. 7A is a discretion vested in this court. The exercise of that judicial discretion is not arbitrary but done by application of set judicial principles. The principles upon which the courts exercise their discretion in this regard may be summarised as follows:

(a) the plaintiff/applicant must have or show a *bona fide* cause of action against the persons known or unknown;

(b) the plaintiff/applicant must establish that the plaintiff/applicant requires information and documents which are in the possession, custody or control of the defendant/respondent; and

(c) the information and documents sought are necessary for the plaintiff/applicant to properly institute proceedings against persons known or unknown.

[8] In this regard, the affidavit in support of the application must meet the following requirements:

(a) the affidavit must specifies or describes the documents sought;

(b) the affidavit must shows, if practicable by reference to any pleading served or to be served in the proceedings, that such documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings, or identity of the likely parties to the proceedings, or both;

(c) the affidavit must shows that the person against whom the order is intended to be made is likely to have or have had such documents in his possession, custody or power; and

(d) in the case of r. 7A(1), the affidavit must states the grounds on which the person against whom the order is intended is likely to be party to subsequent proceedings.

(See *Shaw v. Vauxhall Motors Ltd* [1974] 1 WLR 1035; [1974] 2 All ER 1185 CA; and the commentary in the *Malaysian Civil Procedure 2015*, vol 1, Sweet & Maxwell, at p. 353.)

The Background Facts

[9] The first defendant had at the material time beginning from 1974 maintained a trading account with the plaintiff to trade in commodities. To secure payments outstanding to the plaintiff, the first defendant had created charges over two properties, namely:

(a) the property; and

(b) a property known as Lot 1106, Section 57, Town and District of Kuala Lumpur ("the second property").

[10] The plaintiff states that based on its records, the documents evidencing the charges created over the property and the second property were kept by the plaintiff's then solicitors, Messrs Skrine & Co, and a copy was kept by the first defendant, without a copy being extended to the plaintiff. By virtue of the first defendant's default in paying the sums secured by the charges, the plaintiff proceeded with foreclosure action against the second property, which was then sold by way of public auction on 18 October 1978 for the sum of RM363,000.

[11] The plaintiff states that based on its records, no foreclosure proceedings were carried out against the property and therefore asserts that the property remains charged to the plaintiff. Sometime on or about 26 August 2010, the plaintiff received an email from the second defendant, who is the present company secretary of the first defendant, *inter alia*, stating that the first defendant is deemed to have their shares pledged to the plaintiff sold off and that the first defendant is no longer indebted to the plaintiff. In this regard, the second defendant enclosed copies of form 42B (Companies Act 1965) for

the execution of the plaintiff. The form 42B was ostensibly for the purpose of discharging the CCM charge dated 23 April 1976 registered as Charge No. 1 with the Companies Commission of Malaysia ("CCM").

[12] The plaintiff further states that upon perusing the attachments to the aforesaid email, in particular the form 42B, the plaintiff believes that it surely must relate to the discharge of the charge over the property and not to a charge in respect of shares allegedly pledged by the first defendant to the plaintiff. The plaintiff *vide* its solicitors' letter dated 22 April 2014 (exh. "OKT-8"), took the position that the first defendant was still indebted to the plaintiff and refused to execute the form 42B to register the discharge of the CCM charge. The plaintiff then sought all documents relating to the charge and the CCM charge to be furnished by the first defendant.

[13] The first defendant, replied *vide* its solicitors' letter dated 12 May 2014 (exh. "OKT-9") refuting that they were still indebted to the plaintiff. The first defendant also stated that they do not have in their possession documents evidencing the creation of the CCM charge nor documents evidencing the charge created over the property.

[14] The plaintiff's current solicitors then wrote to the plaintiff's then solicitors, Messrs Skrine & Co, who had acted for the plaintiff in respect of the creation and registration of the charge, requesting for documents pertaining to the same. However, the plaintiff did not receive any reply from Messrs Skrine & Co. The plaintiff's then personnel who were privy to the transactions with the first defendant, ie, the late Mr Ong Tjin An, who was a director of the plaintiff, has since passed on, and another employee Tjio Kay Loe, has left the plaintiff's employment with effect from 12 July 1977. The plaintiff states that the attempts to contact the said Tjio Kay Loe had been futile. The plaintiff then filed this action to compel the first and second defendants to make discovery of these documents.

The Merits Of The Application

[15] An analysis of the affidavit evidence shows that the CCM *vide* its letter dated 16 March 2015 (exh. "YCM-9") had informed the first defendant that a copy of the form 34 (Companies Act 1965) in respect of the creation of the CCM charge could not be supplied since the document is no longer in its custody. The CCM had cited s. 11(11) of the Companies Act 1965 that provides that the Registrar may, if in his opinion it is no longer necessary or desirable to retain them, destroy any document creating or evidencing a charge or the complete or partial satisfaction of a charge where a memorandum of satisfaction of a charge has been registered for not less than seven years. The plaintiff also confirms this fact. The plaintiff's manual search at the CCM returned no results evidencing the registration of the CCM charge due to the long lapse of time.

[16] The defendants' solicitors also conducted a search at the relevant land office to extract information on the charge. However, the land search result came back with a note "tiada", which the defendants took to mean that no information on the charge was available at the land office. The plaintiff's solicitors also conducted a search at the relevant land office, and the result showed that the property was now held under "Geran 12765" instead of "CT 3114". However, the land search did not reveal any information as regards the charge.

[17] The defendants had also made a thorough search of all records in their possession and found some contemporaneous correspondence and documents in respect of the charge and the discharge of the charge. However, the defendants were unable to trace the charge documents itself. From these retrieved correspondence and documents, it would appear that the first defendant did create the charge in favour of the plaintiff. However, it also appears from these documents that the charge was fully satisfied and the plaintiff issued a letter dated 5 September 1977 to then Pendaftar Syarikat Malaysia to the effect that the charge had been satisfied on 12 August 1977 (exh. "YCM-1").

[18] Pursuant thereto, as required by the Companies Act 1965, the first defendant made a statutory declaration verifying memorandum together with a necessary memorandum in form 43 to state that the property is released from the registered charge or has ceased to form part of company's property or undertaking and presented the same for registration at the office of the Pendaftar Syarikat Malaysia (exh. "YCM-2"). And pursuant thereto, the then Assistant Registrar of Companies, Malaysia, issued to the first defendant a certificate of registration of satisfaction of charge dated 14 October 1977 (exh. "YCM-3"). This would mean that the CCM charge has been satisfied.

[19] The satisfaction of the CCM charge is further corroborated by the contemporaneous exchange of correspondence between the plaintiff's and first defendant's then solicitors (exhs. "YCM-4" to "YCM-6"). This correspondence shows that there was a negotiations between the plaintiff and the first defendant in respect of the settlement of the monies owing by the first defendant to the plaintiff. It appears that the plaintiff and the first defendant had agreed to a settlement figure of $275,000 (now RM) as full and final settlement. It also appears from the correspondence that a sum of $75,000 was paid by the first defendant to the plaintiff's then solicitors, for which receipts were issued by the plaintiff's then solicitors (exh. "YCM-7"). As for the balance of $200,000, it appears that an undertaking to pay the same was provided by the first defendant's then solicitors, Messrs Chooi & Co, to the plaintiff's then solicitors. Although there are no documents evidencing the payment of the balance settlement sum of $200,000, the first defendant states that the same had been settled because:

(a) a discharge was executed and fees were paid to the plaintiff's solicitors for preparing the discharge of charge (exh. "YCM-8"); and

(b) upon the discharge, the title appears to have been subsequently transferred to third parties (exh. "OKT-10").

[20] The defendants submit that after having spent considerable time, effort and cost to search and obtain whatever documents that they reasonably could procure; and after having forwarded them to the plaintiff, the plaintiff unreasonably continues to challenge the accuracy and veracity of these documents, in the hope of stringing together a case against the first defendant. The defendants argue that despite their best efforts, the plaintiff continues to pressure them to produce documents that they do not have in their possession or custody, and accuse them of fraudulent, improper and/or negligent conduct without any basis at all.

[21] I find that there is much merit in the defendants' argument. I agree with the defendants' contestation that documents that have been produced by the defendants were made a very long time ago, ie, some 39 years ago, and in such circumstance, the presumption of due execution and attestation under s. 90 of the Evidence Act 1950 would apply. See *Ghazali bin Arifin v. Ahmad bin Bakar* [1992] 1 MLJ 282; and *Chan Pooi Leng v. Jabatan Ketua Pengarah Tanah dan Galian Persekutuan Unit Pembahagian Pusaka Perak Timur, Pejabat Tanah/Daerah, 33000 Kuala Kangsar; Mohamad Iqbal Shah Abdullasah (Intervener)* [2014] 1 LNS 64; [2015] 9 MLJ 121.

[22] I further find that the defendants have used their best endeavor to retrieve and produce documents in their custody, control or possession. The defendants contend that they have produced all the correspondence and documents that can possibly be produced by them and that they have no other documents relating to the charge or the CCM charge in their custody or possession. In the circumstance, it would be rather illogical for the plaintiff to seek the assistance of this court for an order to compel production of documents that the defendants say they do not have in their possession or to which they have access. The defendants cannot be faulted for the plaintiff's own recklessness or negligence in not keeping proper records of their own. Nor do the defendants owe a duty to the plaintiff to securely keep these documents and produce them as and when the plaintiff requires them.

[23] The plaintiff contends that the first defendant has a statutory obligation under s. 115 of the Companies Act 1965 to keep a copy of all charging instruments and maintain a register of charges at the registered office of the company. The plaintiff further contends that the CCM charge is one that is captured by s. 115 of the Companies Act 1965 and therefore the first defendant ought to be ordered to produce the same. I agree that there is a statutory obligation on the part of the first defendant as a company to conform to the requirements of s. 115 of the Companies Act 1965. Obviously, going by the evidence adduced thus far, the first defendant did not securely keep a copy of the CCM charge or maintain a register of charges at its registered

office. Now, if there were a breach of s. 115 of the Companies Act 1965, then it would be for the appropriate authority to take action against the first defendant. Such a breach cannot in any way entitle the plaintiff to an order to compel the production of these documents by the defendants, for the defendants have stated quite categorically under oath that they do not have these documents. As such the plaintiff has failed to establish the primary requirement for the grant of a pre-action discovery order, ie, that the plaintiff requires information and documents, which are in the possession, custody or control of the defendants. In the circumstance, it is obvious that the making of such an order would be an exercise in futility and would not serve any useful purpose.

[24] The defendants have stated that the contents of the email dated 26 August 2010, stating *inter alia* that the first defendant is deemed to have their shares pledged to the plaintiff sold off and that the first defendant is no longer indebted to the plaintiff, was written erroneously under a misapprehension of facts by the second defendant. It is obvious that the second defendant did not have any direct knowledge of transaction between the plaintiff and the first defendant. Indeed the plaintiff too believes that the discharge of charge referred to by the seond defendant in the email could only be in regards to the charge over the property and not to any pledge of shares. After all it is common ground that the first defendant did not at any time pledge any shares to the plaintiff as security for repayment of its debts to the plaintiff.

[25] And, in any event, based on the documents and correspondence before the court, it is more probable than not, that the charge had been satisfied and discharged. Therefore, it would appear that the plaintiff has failed to establish the other essential requirement to support this application, which is that the plaintiff must have a *bona fide* cause of action against the defendants. An order for discovery would be granted only when the plaintiff can demonstrate to the court that it has some cause of action against the defendants, which in this case the plaintiff has failed to do.

[26] The plaintiff has stated in the grounds in support of this application that the plaintiff has reason to believe that the defendants had conducted themselves fraudulently or in an otherwise improper or negligent manner in respect of the charge; and therefore the plaintiff seeks to obtain sufficient documentary evidence from the defendants to put the plaintiff in a position where it is able to make a reasonable assessment of the situation and decide whether to institute an action against the first defendant and/or such other parties. This express desire of the plaintiff is but a manifestation of an intention to go on a fishing expedition, in hope that something may get entangled in the net and finding some material upon which a charge could be hung. That is never the purpose of a pre-action discovery order. See *ABX*

Logistics (Malaysia) Sdn Bhd v. Overseas Bechtel (Malaysia) Sdn Bhd [2003] 7 CLJ 357. It is quite clear that the plaintiff has embarked on a fishing expedition and cast the net wide to seek information and documents from the defendants, which documents the defendants do not have, in the hope of stringing together a possible case against the defendants. That is not the purpose for an order of discovery. Mustil LJ in *Berkeley Administration Inc v. McClelland* [1990] FSR 381 at p. 383 held that:

> It is plain ... that the plaintiff just does not believe anything that the defendants have said in the course of this discovery, and would like to hunt around the documents in the hope that something useful would turn up enabling them to controvert what the defendants have said on oath. That is not what discovery is about at all.

The plaintiff is not entitled to an order for discovery of documents based on some hunch or intuition that the defendants have committed some wrongful or fraudulent acts against the plaintiff. The law on discovery is well settled ie, in the absence of a proper basis for an order for discovery, disclosure should not be allowed.

[27] The plaintiff alleges that the defendants have committed some fraudulent or wrongful acts. In this regard, the plaintiff bears the burden of proving fraud, improper conduct or negligence against the defendants. Now, it is trite that an order of discovery will not be made, where the effect of such an order would have the effect of shifting the burden of proving fraud or impropriety from the plaintiff to the defendants. Not only is the plaintiff seeking to shift the burden of proof, it is also seeking to incriminate the defendants. In such circumstance, an order of discovery cannot be made. See *Kenwood Electronics (Malaysia) Sdn Bhd v. People's Audio Sdn Bhd & Ors* [2003] 5 CLJ 436; [2003] 2 AMR 70, HC; *Triplex Safety Glass Co Ltd v. Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395; and *Mary Ng v. R* [1958] AC 173.

[28] Wherefore, I find that the plaintiff has failed to establish is case for the orders sought and as such I dismissed the originating summons with cost of RM8,000.

Enclosure 13

[29] Enclosure 13 was the plaintiff's application for an order:

(a) that the proceedings herein including the decision of the originating summons (encl. 1) which was fixed to be delivered on 13 August 2015 be stayed/adjourned pending the disposal of this notice of application or any other further order;

(b) for an injunction against the defendants to prohibit the defendants whether by themselves or their agents from presenting the documents exhibited as exhs. "YCM-2" and "YCM-3" in the defendants' affidavit in reply affirmed by the second defendant on 1 April 2015 ("the said documents") to the CCM for the purposes of striking out/cancelling the

CCM charge, or in the event that the said documents have been presented to the CCM, the defendants be ordered to forthwith inform the CCM to withhold perfection or completion of the discharge/striking out of the CCM charge and that the said documents be retrieved/collected back from the CCM; and/or

(c) that the defendants be ordered to produce the original documents (those which are available) or a copy of the documents referred to and mentioned in the defendants' affidavit in reply affirmed by the second defendant on 1 April 2015 and marked as exhs. "YCM-1", "YCM-2" and "YCM-3" ("the documents to be inspected") for the purposes of inspection by the plaintiff and/or its expert document examiner and to permit copies of the documents to be inspected to be taken, pursuant to O. 24 rr. 10 to 13 and 16 of the ROC, within seven days of the order.

[30] I dismissed encl. 13 for the following reasons. The plaintiff filed the originating summons on 23 February 2015 and on 2 April 2015 the defendants filed their main affidavit in reply, which was affirmed on 1 April 2015 by the second defendant. There were three case managements' dates at which directions for filing of affidavits and submissions were given. When the originating summons was called for hearing on 19 June 2015, counsel for the plaintiff and defendants stated that they stood by their respective written submissions and asked for a decision date be fixed for encl. 1. I then fixed 13 August 2015 as the date to deliver decision on the originating summons. Now, if the plaintiff had wanted to file any interlocutory applications in respect of the documents disclosed in the second defendant's affidavit affirmed on 1 April 2015, which was filed and served on 2 April 2015, the plaintiff could have done so well before the date fixed for the delivery of decision on the originating summons on 13 August 2015. However, the plaintiff filed encl. 13 on 10 August 2015, ie, three days before delivery of decision on 13 August 2015 seeking the several orders for inspection of documents, prohibitory and mandatory injunctions and stay of proceedings. It must be gainsaid that at the date on which encl. 13 was filed, the only pending matter in respect of this proceeding was the delivery of my decision on the originating summons. The plaintiff did not give any plausible reason for the delay in making this application at the eleventh hour. The plaintiff has dragged the defendants to court and it would be highly prejudicial to the defendants to stay proceedings and have the matter hanging in abeyance.

[31] In any event, the plaintiff's application in the originating summons is for discovery of documents pursuant to O. 24 r. 7A of the ROC. I fail to see how an order for inspection by a document examiner of the documents alluded to and exhibited in the second defendant's affidavit in reply dated 1 April 2015 could in any way assist the court in coming to a decision on that application.

[32] Further, the application for permanent prohibitory and mandatory injunctions is completely misplaced and is without any legal basis. Now, it is well settled that injunction is a remedy that must flow from some established cause of action. In *Nishimatsu Construction Co Ltd v. Kecom Sdn Bhd* [2008] 6 CLJ 149 CA, Gopal Sri Ram JCA held that:

> … the injunction applied for should have not been granted because there was no pleading against the appellant on which the injunction could issue. It is settled law that the right to obtain an interlocutory injunction is not a cause of action. There must be a cause of action pleaded in the usual fashion before an interlocutory injunction may be applied for and obtained.

That was a reiteration of the principle that was enunciated by Lord Diplock in *Siskina (Cargo Owners) v. Distos Compania Naviera SA* [1979] AC 210 where the learned judge stated that:

> The right to obtain an interlocutory injunction is merely ancillary to the pre-existing cause of action. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.

[33] As I have pointed out earlier, the plaintiff's pleadings are devoid of any discernable cause of action. In the circumstance, based on established case authority, no injunction can be granted as prayed.

[34] In the circumstance, I fail to see any special circumstance warranting a stay of proceedings, where at this stage, only the delivery of my decision on encl. 1 remained.

[35] Clearly, the filing of encl. 13 is an abuse of process, to delay delivery of the decision of the court, and nothing more. Wherefore, I dismissed encl. 13.